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In The

Supreme Court of the United States

Spring Term, 1968

No. 1176

FRANCIS WILSON ..... PETITIONER

V.

MARTIN J. WIMAN, Superintendent,
Kentucky State Reformatory,
LaGrange, Kentucky ..... RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I certify that a copy of the within Response to Petition for Writ of Certiorari was mailed to: Honorable John David Cole, P. O. Box 566, Bowling Green, Kentucky, Counsel for Petitioner. This 14th day of March, 1968.

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FRANCIS WILSON ----------*Petitioner*

V.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

MARTIN J. WIMAN, Superintendent,
Kentucky State Reformatory,
LaGrange, Kentucky ----------*Respondent*

OPINIONS BELOW

The petitioner took a direct appeal, from his 1964 recidivist conviction in the Monroe Circuit Court, to the highest court in Kentucky, which decision is reported as Wilson v. Commonwealth, Ky., 403 S.W. 2d 705 (1966). The petitioner filed a motion to vacate the judgment in a 1933 conviction in Warren Circuit Court [this was one of two previous convictions involved in the 1964 recidivist conviction]. From an adverse ruling, he appealed to the Court of Appeals of Kentucky, which decision is reported as Wilson v. Commonwealth, Ky., 403 S.W. 2d 710 (1966).

Petitioner later filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky at Louisville. From denial of that writ [see Appendix D of petitioner's petition], he took an appeal to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the judgment of the District Court in Wilson v. Wiman (USCA – 6, 1967) 386 F. 2d 968 [see advance sheets].

JURISDICTION

The petitioner files his petition pursuant to 28 U.S.C.A § 1254 (1) as he seeks to have this Court review the case in the Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

I. WHERE THE RECORDS OF THE WARREN CIRCUIT COURT DO NOT SPECIFICALLY INDICATE PETITIONER WAS APPOINTED COUNSEL DURING HIS 1933 TRIAL AND CONVICTION, AND THERE BEING A STRONG PRESUMPTION AGAINST THE WAIVER OF THIS CONSTITUTIONAL RIGHT, WAS PETITIONER'S CONVICTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

II. WHETHER THE TRIAL JURY'S JOINT CONSIDERATION AT PETITIONER'S 1964 TRIAL IN THE MONROE CIRCUIT COURT OF THE SPECIFIC CRIME THEREIN ALLEGED, PLUS THE MATTER OF HIS TWO FORMER CONVICTIONS, DESTROYED THE JURY'S IMPARTIALITY AND VIOLATED PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

III. WHERE THE PROCESS LEADING UP TO THE HABITUAL CRIMINAL JUDGMENT OF 1964 IS NOT SUCCESSFULLY CHALLENGED, AND WHERE THE PETITIONER WAS REPRESENTED BY COUNSEL AT THE RECIDIVIST TRIAL AND HAD AN OPPORTUNITY TO RAISE THE ALLEGED INFIRMITY OF LACK OF COUNSEL IN THE 1933 PREVIOUS CONVICTION TRIAL, IS THE PETITIONER BARRED FROM ATTACKING THE PREVIOUS CONVICTION OF 1933 BY FLANK ATTACK, I.E., BY HABEAS CORPUS PROCEEDINGS?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Kentucky's recidivist statute is KRS 431.190, as shown in full at page 3 of petitioner's petition. Petitioner mentions the Sixth Amendment of the Constitution of the United States in connection with its guarantee of an impartial jury and assistance of counsel, and the Fourteenth Amendment as making such rights obligatory upon the states under the due process clause of the latter amendment to the Federal Constitution.

STATEMENT

In 1933 petitioner was convicted in the Warren Circuit Court of dwelling house breaking. The sentence has been served. In 1935 he was again convicted of dwelling house breaking in the Warren Circuit Court; and that sentence was likewise served. He is currently confined under a life sentence as an habitual criminal [see KRS 431.190, p. 3 of the petition], which sentence was imposed incident to a 1964 conviction in the Monroe Circuit Court for storehouse breaking.

At the time of his 1933 conviction, petitioner was under 18 [and thus he was a juvenile]; and the Court of Appeals of Kentucky found that he waived examining trial and was held to the grand jury; and that it was evident that the juvenile court did waive jurisdiction. Wilson v. Commonwealth, Ky., 403 S.W. 2d 710 (1966) at 713.

The petitioner filed a motion to vacate the 1933 conviction in the Warren Circuit Court, contending that he had no counsel at the trial. And he pleaded guilty at that trial. On petitioner's indictment, however, the name "Stagner" was written; and evidence was presented that it was the custom in that trial court to enter the name of the defense attorney at the top of the indictment. Stagner was a practicing attorney in Bowling Green [site of the Warren Circuit Court] at least from 1932 to the present.

The motion to vacate was overruled and petitioner took an appeal to the Court of Appeals, that Court affirming in Wilson v. Commonwealth, Ky., 403 S.W. 2d 710 (1966). The records contain no statement, as such, as to whether or not he had counsel. Only the petitioner [and this is outside of the original trial record] states that he had no counsel.

At the 1964 recidivist trial the two former convictions were introduced to the jury for joint consideration with the issue of the specific crime alleged. This action was taken by the Commonwealth's Attorney pursuant to Kentucky's Habitual Criminal Act, KRS 431.190. See Wilson v. Commonwealth, Ky., 403 S.W. 2d 705 (1966).

In July, 1966, petitioner filed a petition for writ of habeas corpus in the United States District Court at Louisville, contending that he had no counsel in the 1933 conviction, and thus claiming that due process was lacking, and that the Kentucky habitual criminal procedure of one stage was a denial of due process. It may be noted at this point that Spencer v. Texas, 385 U.S. 554, 17 L.ed2d 606, 87 S.Ct. 648, was not decided by this Court until January 23, 1967.

The District Court denied the writ of habeas corpus by order dated September 27, 1966 [petitioner's Appendix D] and he appealed to the United States Court of Appeals for the Sixth Circuit. The briefs of the petitioner and the State were filed prior to the decision in Spencer. The oral argument before the United States Court of Appeals was held on October 5, 1967, several months after Spencer was decided. In the affirming decision of the Court of Appeals, Wilson v. Wiman, 386 F. 2d 968, the Court said:

> "Recognizing that Spencer v. State of Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.ed2d 606 (1967), foreclosed this contention [the general objection to one stage procedure], the petitioner amended his petition to assert that the failure of the trial court to give any

limiting instructions to the jury removed this case from the Spencer rule."

The pertinent instructions of the Monroe Circuit Court, relating to the one stage procedure, are shown in petitioner's Appendix C to his petition.

ARGUMENT

I

THE WRIT SHOULD BE DENIED, SINCE THE COURT OF APPEALS PROPERLY DECIDED THE CONSTITUTIONAL ISSUE RAISED IN THE NO COUNSEL CONTENTION.

Petitioner contends that the presumption of regularity of Court proceedings must give way to the presumption against waiver of counsel. The Court of Appeals, in Wilson v. Wiman, 386 F.2d 968, held that petitioner's reliance upon this conflict of presumptions is misplaced; and that before the conflict arises the petitioner must establish that he did not have counsel at the trial. Petitioner primarily relies upon his naked assertion that he had no counsel. On the other side, the State produced proof that it was a custom of the Circuit Judge to place the name of the defense counsel on the indictment. The name of "Stagner" [a practicing attorney in Bowling Green since 1932 to the present] appears on petitioner's indictment. The record is otherwise silent on the point. But the State's proof must be coupled with the presumption of regularity. This Court pointed out in Johnson v. Zerbst, 304 U.S. 458, 82 L. ed 1461, 58 S.Ct. 1019, that, while it recognizes that the Sixth Amendment guarantees that the accused shall have assistance of counsel, "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on habeas corpus" and that "when collaterally attacked, the judgment of a court carries with it a presumption of regularity."

Thus the United States Court of Appeals held that the State's "proof coupled with the presumption of regularity in court procedures is sufficient to overcome petitioner's bare allegation that he was without counsel." The Court added that, "Had petitioner established that he was without counsel, a heavy burden would have rested upon the State to prove that the right to counsel had been knowingly and intelligently waived." Wilson v. Wiman, above.

ARGUMENT

II

THE WRIT SHOULD BE DENIED, SINCE THE CLAIMED UNCONSTITUTIONALITY OF THE RECIDIVIST ONE STAGE PROCEDURE HAS BEEN REJECTED IN SPENCER. MOREOVER, THE FACTS OF THE INSTANT CASE ARE DISSIMILAR TO THOSE IN SPENCER, AS RELATES TO THE "DELIMITING INSTRUCTIONS" ASPECT.

In Spencer, the petitioner, Spencer, made timely objections to the reading to the jury of that portion of the indictment relating to prior convictions; and he objected as well to the introduction of evidence to show his prior conviction. The United States Court of Appeals noted that none of the record before it indicated that this petitioner made timely objections to such reading of the indictment or the admission of such evidence or to the instructions in this regard. Moreover, the Court noted that Wilson elected to take the stand in his own defense and that evidence of his prior convictions would have been properly admissible as affecting his credibility. In fact under questioning of his attorney, he admitted his convictions of 1933 and 1935. The Court of Appeals [Sixth Circuit] wrote:

> "Deficiencies in jury instructions are generally waived unless they are asserted on appeal, and in the

> usual case the deficiency cannot be asserted on appeal unless a timely objection was made to the trial court. Nutt v. United States, 335 F.2d 817 (10th Cir. 1964)."

Kentucky follows that rule. See Stewart v. Commonweatlh, Ky., 389 S.W.2d 910 (1965). The Court of Appeals in Wilson v. Wiman, above, added:

> "According to Spencer a limiting instruction would have cured the prejudicial effects of the introduction of petitioner's prior convictions. The petitioner was represented by counsel at his trial [1964 recidivist], on his appeal, and at his State post conviction proceedings. Having bypassed his opportunity to object to the lack of an instruction in these proceedings, the petitioner cannot now raise the issue in a federal collateral attack on his trial."

Furthermore, an examination of the instructions [petitioner's Appendix C] shows that the grammatical structuring of the instructions with the use of the conjunction, "and," to separate the current offense from the previous convictions, reflects the obvious irrelevancy of the previous convictions on the question of guilt of the current offense. Certainly it must be presumed that the jurors will follow the wording of the court, else the intelligence of the jurors is in grave doubt. Apparently, this Court felt in Spencer that evidence of previous convictions would be usually excluded except when it is particularly probative in showing such things as intent, an element in crime, "or when the defendant has testified and the State seeks to impeach his credibility."

See Gayes v. New York, 332 U.S. 145, 91 L.ed 1962, 67 S.Ct. 1711 (1947), in which a petitioner, through post conviction procedure and this Court on certiorari, attacked a previous conviction involved in a multiple offender conviction on the ground that he had no counsel in the previous conviction. This Court denied relief on the ground that, having had the opportunity to

attack it in his multiple offense case, he was forever barred from such collateral attack. We believe a fortiori that the Gayes principle applies to the general objection to the one stage procedure where petitioner had an opportunity through counsel to raise the precise question but failed to raise it.

ARGUMENT

III

THE WRIT SHOULD BE DENIED, SINCE PETITIONER, AT THE RECIDIVIST TRIAL OF 1964, HAD THE OPPORTUNITY TO RAISE THE ISSUE OF NO COUNSEL IN CONNECTION WITH THE 1933 TRIAL, AND, SINCE THE PROCESS LEADING TO THE 1964 JUDGMENT CANNOT BE SUCCESSFULLY ATTACKED, THE PETITIONER IS BARRED FROM SUCH FLANK ATTACK ON THE 1933 CONVICTION THROUGH HABEAS CORPUS.

The petitioner, on pages 8 and 9 of his petition, sums up the alleged infraction of his constitutional rights:

> The petitioner not only complains of the one stage procedure, but he attacks the 1933 conviction as an integral part of his 1964 conviction.

In Gayes v. New York, 332 U.S. 145, 91 L.ed 1962, 67 S.Ct. 1711 (1947), the petitioner's motion to vacate his previous conviction of 1938 for lack of counsel was denied and, there being no review provided in New York, this Court took jurisdiction and in affirming the lower court said:

> ". . . upon his subsequent sentence, as a second offender, in 1941, he had full opportunity, so far as appears, to contest whatever infirmity he may have claimed in the earlier sentence when the fact of that sentence was included in the sentence which he is now

serving. Since the process leading up to the second sentence is not challenged he cannot now, so far as the United States Constitution is concerned, by a flank attack, challenge the sentence of 1938."

In footnote 3 in Gayes, 91 L.ed at 1965, the Court remarked:

> ". . . It is certainly within the power of a duly advised defendant, before pleading guilty as a second offender, to raise the constitutional invalidity of the first sentence so as to secure opportunity appropriately to challenge such invalidity. Nothing that is herein decided precludes petitioner from raising a denial of his constitutional right upon a record that discloses circumstances other than those before us. . . ."

Here, the petitioner could have raised at the 1964 trial the issue as to no counsel in 1933 and the issue as to the one stage procedure. He failed to do so; now he is barred, since he is coming to this Court by way of an original petition for habeas corpus and an appeal therefrom to the United States Court of Appeals.

The Gayes doctrine was applied in United States v. Moore (CA 7 – 1948), 166 F.2d 102; and in Copeland v. Commonwealth, Ky., 415 S.W.2d 842 (1967). In Copeland the Court pointed out that the previous conviction, involved in an habitual criminal case, could have been attacked in the Kentucky recidivist trial.

Petitioner relies upon Burgett v. Texas, ———U.S.———, 19 L.ed2d 319 (1967), insofar as it holds that the admission of a prior criminal conviction which is constitutionally infirm under Gideon [Gideon v. Wainwright, 372 U.S. 335, 9 L.ed2d 799, 83 S.Ct. 792] is inherently prejudicial, and in insisting that presuming waiver of counsel from a silent record is impermissible. Of course, we don't reach the waiver issue, since the presumption of regularity was not overcome by petitioner.

Further, we urge that Burgett is not relevant to this case. First, Burgett is not within the frame of the Texas recidivist procedure involved in Spencer v. Texas, 385 U.S. 554, 17 L.ed2d 606, 87 S.Ct. 648 [where the constitutionality of considering prior convictions, before determining guilt or innocence on a current offense in a recidivist case, was recently upheld]. Under the State's evidence as to prior convictions [only the second version of the prior Tennessee conviction was allowed into the record], the recidivist statutes did not apply to the current offense. Yet the fact of four previous convictions, as a part of the five count indictment, was read to the jury at the outset. Later, while the trial court instructed the jury not to consider prior convictions in reaching a verdict, no explanation of the status of the four prior convictions was given. And evidence as to one of the prior Tennessee convictions was heard by the jury, though the recidivist statutes did not apply. Thus Spencer had no application to Burgett.

In addition, in Spencer the prior convictions were not presumptively void [there was no issue of lack of counsel in the prior convictions]. In Burgett the Court said: "In this case the certified records of the Tennessee convictions on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceedings, and therefore that his conviction was void." The first version of the Tennessee conviction read: "Came the Assistant Attorney General for the State and the defendant in proper person and without counsel." A second version omitted the phrase "without counsel." This discrepancy was never explained.

Therefore, the Spencer case, and not Burgett, is relevant to the 1964 recidivist trial of petitioner, since the 1964 trial was a recidivist case and since the convictions on their face raised no presumption of constitutional infirmity.

CONCLUSION

We urge that the issues raised here were carefully reviewed by the United States Court of Appeals for the Sixth Circuit in Wilson v. Wiman, 386 F. 2d 968. We believe it can be observed from the above analysis and the authorities cited that the United States Court of Appeals has not decided the Federal questions in a way in conflict with the applicable decisions of this Court [see Rule 19 of this Court]. We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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